

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 70 of 1998

AJEETBHAI VITHALBHAI PATEL

Versus

HEIRS AND L.R. OF DECD. FULABHAI MAGANBHAI PATEL

Appearance:

MR PV NANAVATI for Appellant

CORAM : MR.JUSTICE S.K.KESHOTE

Date of Order: 23/07/98

C.A.V. ORDER

1. This second appeal under section 100 of Civil Procedure Code, 1908 is directed against the judgment and decree passed by the learned 2nd Extra Assistant Judge, Vadodara dated 27th February, 1998 in Regular Civil Appeal No.33 of 1989.

2. The facts of this case, in brief, are that the plaintiff-appellant filed Regular Civil Suit No.64 of 1974 in the Court of Civil Judge, (S.D.), Vadodara at Vadodara in which prayer has been made for grant of decree for specific performance of the agreement to sale of the agricultural land bearing Survey No.333 admeasuring 1 acre and 7 gunthas executed by predecessor in title of the defendant-respondent on 24th May, 1972. The predecessor in title of the defendant-respondent agreed to sale the land in dispute to the plaintiff-appellant at the rate of Rs.7151/- per acre.

3. The learned trial court under its judgment and decree dated 31-1-1989 partly allowed the suit of the plaintiff-appellant. The suit for specific performance has been rejected but the plaintiff-appellant was held to be entitled for refund of Rs.4800/- with running interest at the rate of 6% p.a. from the date of execution of the sale agreement dated 24-5-1972. The plaintiff-appellant dissatisfied with said judgment and decree of the trial court preferred the first appeal which came to be decided on 27-2-1998 by the 2nd Extra Assistant Judge at

Vadodara. That appeal has been dismissed. Hence, this second appeal.

4. At page-F of the memo of appeal, the learned counsel for the appellant framed the substantial questions of law, which as per his say does arise in the appeal. These questions as framed by the counsel for the appellant are as under:

1. Whether the Civil Court, in view of Section 36B(2) of the Bombay Prevention of Fragmentation Act, 1947 is competent to settle, decide and deal with the agreement to sale dated 24-5-1972 arising under the said Act.
2. Whether both the courts erred in not referring the issue to the Competent Authority under the Bombay Prevention of Fragmentation Act.
3. Both the courts failed to take into consideration the effect of the extension of the limits of the City of Vadodara on 17-4-1975 whereby the suit survey No.333 of village Vasna Sayaids has been brought within the limits of the Municipal Corporation of the City of Vadodara.
4. Both the courts erred in not taking into consideration the effect of bringing the aforesaid land within the limits of the Municipal Corporation and decided the issue whether Bombay Tenancy and Agricultural Lands Act and the Bombay Prevention of Fragmentation Act, apply.
5. The main plank of the argument of the learned counsel for the appellant before this Court in this appeal is that the Civil Court has no jurisdiction to settle and decide that the land in dispute was a fragment and as such, the agreement to sale of the same was void. In this respect, reference has been made to the provisions of section 36B (2) of the Bombay Prevention of Fragmentation Act, 1947. The arguments are also advanced on other substantial questions of law framed in the appeal.
6. The learned trial court in its judgment held that the suit land is a tukda land (fragment) and it is prohibited from transfer under section 7 of the Bombay Prevention of Fragmentation Act, 1947. It has further been held that the transfer of the fragment is not permissible under the Act aforesaid and as such the agreement to sale is a void agreement and the plaintiff

was held to be not entitled for specific performance of the agreement. However, the earnest money which was paid by the plaintiff-appellant to predecessor in title of the defendant-respondent has been ordered to be paid with interest.

7. The first appellate court has considered this aspect of the matter and that part of the judgment of the trial court has been confirmed. The first appellate court has made reference to the revenue record Ex.76 to 78 and relying on those documents, the first appellate court found that the suit land is a fragment (new tenure). It has also been held as a fact that the plaintiff-appellant has no adjacent land to that fragment and as such he is not entitled for the purchase of land though he may be an agriculturist. The agreement to sale Ex.30 was held to be not a legal and valid agreement.

8. Section 36 (B) of the Act, 1947 provides that if any suit instituted in any civil court or Mamlatdar's Court involves any issue which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issue under this Act, the civil Court or Mamlatdar's Court shall stay the suit and refer such issues to such competent authority for determination.

9. The contention of the learned counsel for the plaintiff-appellant is that in the suit, issue is involved - whether the land in dispute is a fragment or not, and as such, instead of deciding this issue the Civil Court should have stayed the suit and this issue should have been referred to the competent authority for decision, and as it has not been done, the judgments of both the courts below deserve to be quashed and set aside.

10. The plaintiff had gone to the civil court for the enforcement of the agreement to sale. He prayed for decree for specific performance. While considering this question - whether in the present case, decree for specific performance is to be granted or not, the trial court was within its competence to see whether this agreement is enforceable or not. For consideration of this purpose, the court has to see all the points involved in the case. The defendants have all the right to contest, that for the given reasons, the decree for specific performance cannot be granted.

11. In this case, the issue has been raised that the land in dispute is a fragment and as such its transfer is

prohibited under section 7 of the Act, 1947. This point has been considered and the trial court declined to grant decree for specific performance, which has been confirmed by the appellate court.

12. The learned counsel for the appellant has raised a technical issue but he has not challenged the finding of the courts below that the land in dispute was a fragment. It is understandable where there is a dispute that whether the land is a fragment or not, the issue would have been referred to the competent authority but where there is no dispute on the point that the land is a fragment then it is only a question of seeing the provisions of Act, 1947 and section 7 of the said Act clearly prohibits the transfer of such land. On the basis of the revenue record, which has come on the record of the suit, both the courts below have accepted that this land is a fragment and as stated earlier and again it is stated at the cost of repetition that this finding of the court below i.e. the trial court has not been challenged by the appellant before the first appellate court nor he has challenged this finding before this Court. Once on the basis of documentary evidence, i.e. the revenue record, it is found that the land is a fragment and no dispute has been raised by the plaintiff-appellant on this issue, the Civil Court was not required to refer the issue to the competent authority. The Civil Court has to consider only the legal consequences from the undisputed fact and legal consequences clearly borne out from section 7 of the Act, 1947. In view of this fact, the point raised by the learned counsel for the appellant is even not a question of law what to say a substantial question of law. In view of the provisions of section 7 of the Act, 1947 this agreement to sale was not enforceable and as such the courts below have not committed any illegality in not granting the decree for specific performance in favour of the plaintiff-appellant in the present case.

13. Another point which is sought to be raised is that the suit land falls within the limits of Municipal Corporation but the learned counsel for the appellant failed to show any provision from the Act, 1947 or any provisions from any other Act that by extension of limits of the City of Vadodara under which the Survey No.333 falls, the provisions of the Act, 1947 are not applicable.

No other point is required to be dealt with as on this short ground, this appeal deserves to be dismissed.

14. In the result, this appeal fails and the same is dismissed.

(S.K. Keshote, J)

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